United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1218

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1264, 1436

IN THE MATTER OF THE COMPLAINT

of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,

Appellant.

69 Civ. 5306

BINGHAM & COMPANY, et al.,

Plaintiffs-Appellants,

against

THOS. & JNO. BROCKLEBANK, LTD.,

Defendant-Appellee.

70 Civ. 290

KELLER INDUSTRIES INC.,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD., et al.,

Defendants-Appellees.

69 Civ. 4644

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS BINGHAM & COMPANY, ET AL.

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS BINGHAM & COMPANY, ET AL.

A vessel owner who desires to avail itself of the defense of "error in navigation" must first establish that he exercised due diligence to properly man his vessel with duly licensed, competent personnel.

In the case of *The Temple Bar*, 45 F. Supp. 608 (D.C. Md. 1942), aff'd 137 F.2d 293 [CA 4th 1943], the District Court said at page 617:

> "[16] It is true that the Carriage of Goods by Sea Act does not reduce the standards, imposed previous to that legislation, by which the seaworthiness of a vessel is to be tested, nor the requirements which constitute the exercise of due diligence. *It must also be conceded that if the facts in any case disclose unseaworthiness resulting from the vessel owner's failure to exercise due diligence to make the vessel seaworthy, which concur with negligent navigation in causing the loss, the owner will be liable. That is to say, unseaworthiness cannot be transformed into bad seamanship for the purpose of avoiding responsibility for loss of vessel or cargo.* If more than one means is required to effect seaworthiness, the lack of any one of them cannot be excused. The Maria, 4 Cir., 91 F.2d 819; Leathem Smith-Putnam Navigation Co. v. National Union Fire Insurance Co., 7 Cir., 96 F.2d 923." (emphasis added)

In the case herein the District Court found that one of the reasons the ship stranded was that her master, Captain Koutsoukos, and his assistant the unlicensed acting second mate, Alexopoulos, failed to take into account the effect of the easterly current when charting the vessel's course through One and One Half Degree Channel. The District Court further found that the current charts with which the "Nicolaos S. Embiricos" was equipped contained sufficient

information to warn her master and his unlicensed assistant that when approaching One and One Half Degree Channel from Ceylon, during the month of May, the "Nicolaos S. Embiricos" would be set by the current toward Suvadiva Atoll.

Captain Maiden, the expert witness produced by the ship owner, Compania Naviera Epsilon, S.A., testified on direct examination as follows:

"Q. Assuming, Captain, that you know from the projection of this line of 230 that the vessel has experienced a set to the southeast—or, rather, south and east, because you said east and south, right? I don't think you used the term 'southeasterly.'

A. No.

Q. —what would that then do with respect to your projected course for the next period of time approaching the One and a Half Degree Channel?

A. Having ascertained the current, I would naturally allow for it.

Q. Would you also consider the publications available to you, specifically Exhibit 14?

A. Yes.

Q. Would you examine them? You have examined that, right? (54)

A. I have examined that.

Q. What did you determine from the current charts, plural, for May that you would think most likely to be encountered?

A. I would expect an easterly set.

Q. Of how much strength?

A. About 18 miles a day of three-quarters of a knot.

Q. How would you determine that?

A. I would, from the interpolation of the current arrows, of the strengths on the direction of the current, to the northward and southward to One and a Half Degree Channel.

Q. Would you also consider the current roses?
A. I would also consider those." (p. 244a)

and further said at page 247a:

"Q. If a capable navigator knows the direction of the current and the speed of the current, should he be able to determine the actual course and speed of the vessel over the ground? (70)
A. Yes."

It is not disputed that Captain Maiden, the ship owner's expert, is a competent navigator, and master.

The unlicensed acting second officer, Alexopoulos, who was on watch at noon May 14 when the master laid off the course which he *guessed* would safely take the vessel through One and One Half Degree Channel, had not read the current charts, and did not know that the monsoon winds, which occur during the month of May, cause an easterly set to the current in the area between Ceylon and the Maldivian Islands. Alexopoulos said:

"The running ashore is attributed to the currents which prevailed in the area in question. These had not been taken into account because sometimes they go in one direction and at other times they go in the opposite direction." (p. 233a)

Further, Alexopoulos, the boatswain, was incapable of performing the basic navigational problem of determining the actual course and speed of a vessel which is encountering the set and drift of an ocean current.

The testimony elicited from Captain Koutsoukos established that he did not know how to interpret the information contained on the current charts (Ex. 14) which were aboard the "Nicolaos S. Embiricos." He was unaware that during the month of May the monsoon winds caused

a strong easterly set to the current between Ceylon and the Maldivian Islands, and he, as well as his assistant the unlicensed second mate, was incapable of determining the actual course and speed of a vessel given the direction and strength of the ocean current.

An error in navigation is either an error in judgment or an error made in a mathematical calculation, and necessarily involves the competence of the ship's officers. If those designated by the ship owner with the task of navigation are ignorant of the essential and available facts, are incapable of performing basic navigational problems, it cannot be said that they committed an error in judgment or an error in mathematical calculation. Captain Koutsoukos and his assistant, the boatswain, who was acting as second officer, did not commit an error in navigation when they laid out the improper course—they merely made an uneducated guess.

Captain Koutsoukos believed that the course would take the vessel from 16 to 20 miles north of Suvadiva Atoll. The ship stranded 4 miles south of the northern tip of the island. His guess was some 20 and 24 miles off.

Koutsoukos was not even a prudent master. He absented himself from the bridge at a time when his ship was approaching what he knew, or should have known, was a dangerous, narrow passage (opinion 87a).

In the case of *United States* v. *Wessel, Duval & Co.*, 123 F. Supp. 318 (S.D.N.Y. 1954), the Court said at page 336:

> "At the time the Master was standing the watch, the vessel was traveling in 'close waters', and, in any event, his presence on the bridge would have been dictated by prudence."

Section 1304 of the Carriage of Goods by Sea Act, i.e., that portion of the Act which absolves an ocean carrier for damage to its cargo resulting from negligence in naviga-

tion, was designed to relieve an owner who has exercised due diligence to properly man and equip his ship from the occasional acts of negligence committed by competent, but nevertheless fallible, personnel. This exculpatory clause was not meant to exonerate a ship owner from the duties imposed upon it under Section 1303 of the Carriage of Goods by Sea Act, i.e., his obligation to "exercise due diligence to properly man, equip and supply the ship".

Comments on Burden of Proof

In *Ionian Steamship Company of Athens* v. *United Distillers of America, Inc.*, 236 F.2d 78 [CA 5th 1956], Judge Brown said (at p. 80):

> "It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' [1] navigational error, [2] stranding or [4] latent defect, [6] any other cause without actual fault or privity, The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. Ed. 546; and certainly not if these were merely concurring causes. Compania de Navigacion La Flecha v. Brauer, 168 U.S. 104, 118, 18 S. Ct. 12, 42 L. Ed. 398; The Olga S., 5 Cir., 25 F.2d 229, 1928 A.M.C. 831."

In the case herein cargo claimants have established that the "Nicolaos S. Embiricos" was unseaworthy both by reason of improper manning and by reason of the fact that she was not properly supplied with up-to-date navigational publications. The burden of proof is upon the carrier to then establish either (a) that he exercised due diligence to make his ship seaworthy (Carriage of Goods by Sea Act, Section 1303), or (b) that the cause of the loss was *solely* due to an exception granted by the Carriage of Goods by Sea Act with respect to error in navigation or management.

We submit that where it has been established that the vessel was improperly manned by unlicensed and incompetent personnel, whose acts caused or contributed to the stranding, the vessel owner has not sustained his burden merely by establishing that such incompetents committed errors in navigation. Rather, it must go forward and prove that it exercised due diligence to properly man its ship.

Section 1304(1) of the Carriage of Goods by Sea Act provides in part:

> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claming exemption under this section."

That burden Compania Naviera Epsilon has not sustained.

The case of *The Director General of India Supply Mission* v. *The Maru*, 459 F.2d 1370 [CA 2d 1972], is not to the contrary. Therein there was no question raised, no issue was before the court concerning the competence of the officers whose negligent navigation caused the stranding.

Compania Naviera Epsilon, S.A., as Owner of the M.S. Nicolaos S. Embiricos, Failed to Comply With the Greek Manning Requirements in That the Vessel Did Not Have a Full Complement of Licensed Officers

The comments made by Compania Naviera Epsilon, in Point I of its brief, tend to obfuscate rather than clarify the issue.

There is no dispute but that the Instrument of Approval (Ex. 9), rather than the general law of Greece governed the manning of the "Nicolaos S. Embiricos." We agree that the Instrument of Approval does not set any specific

time limitations for the replacement of unlicensed acting mates. We contend, and the District Court held, that pursuant to the Instrument of Approval Compania Naviera Epsilon, S.A. had the obligation of replacing the unlicensed boatswain, Alexopoulos, with a duly licensed mate as soon as such licensed personnel became available.

Admiral Hanides, the ship owner's expert witness on Greek manning requirements, testified as follows :

> ". . . you have to replace them [unlicensed personnel] if you have had opportunity to do so if they [licensed personnel] are available," (188a)

and further said:

> "According to the Greek law when there are no available Second Mates holding equivalent respective tickets. Yes, Mr. Alexopoullos holding a Skipper's ticket first class can be signed on by the competent authority." (189a)

The District Court in its opinion stated that "the critical question" regarding the manning of the vessel with unlicensed personnel was the "availability" of licensed personnel.

The pertinent section of the Instrument of Approval (Ex. 9) re manning requirements reads as follows:

> ". . . the *use* of Greek seamen not possessing the qualifications prescribed by law or even foreign seamen shall be permitted in instances where it is *manifestly difficult* to find suitable and competent Greek seamen readily or in instances where terms other than those prescribed by the laws of Greece, particularly terms relative to the wage scale, are being demanded by Greek seamen." (308a) (emphasis added)

To paraphrase, Compania Naviera Epsilon, as owner of the "Nicolaos S. Embiricos," was permitted to *use* un-

licensed personnel only *in instances where it was manifestly difficult to find*" licensed Greek officers.

Compania Naviera Epsilon contends that if it was manifestly difficult to obtain licensed personnel when the unlicensed boatswain Alexopoulos was *hired* they may then continue to *use* Alexopoulos to act in the capacity of a licensed officer indefinitely, even in instances where licensed personnel became readily available. The argument is specious.

The Maritime Employment Agency of the Kingdom of Greece attested that there were licensed mates available from January 1 through May of 1969. The testimony was uncontradicted and establishes that for approximately four and a half months before the stranding licensed personnel were available. Therefore, Compania Naviera Epsilon, S.A. breached the manning requirements by allowing its vessel to be staffed with unlicensed personnel.

Exhibit Q, the attestation of the Ministry of National Economy Maritime Employment Office, which states that licensed seamen were available and further states that Compania Naviera Epsilon never requested the Maritime Employment Office to supply its ship with licensed personnel, is an official governmental document duly authenticated by the Vice-Consul of the United States of America at Athens. As such it was properly admitted into evidence pursuant to Rule 44 of the Federal Rules of Civil Procedure. It was received into evidence over the objections of counsel for the ship owner. The following colloquy took place between counsel for Compania Naviera Epsilon, S.A. and the Court:

> "Mr. Baillie: I call your Honor's attention to the fact that the rule [Rule 44] goes on to say a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, and so on.

The Court: What do you mean the authenticity and accuracy? Do you question the authenticity of this document as certified by the vice consul, really?

(205) Mr. Baillie: No, I really don't, I am sorry.

The Court: Then you don't need any opportunity for that. Now do you question the accuracy?

Mr. Baillie: Yes, decidedly.

The Court: In what sense? You mean his chief of bureau may have reported inaccurately the situation in his ministry or bureau?

Mr. Baillie: I not only mean that, I am sure that he did.

The Court: Why are you sure that he did?

Mr. Baillie: It would be hearsay again, but I have had my own people investigate.

The Court: And what have they found out?

Mr. Baillie: That this is not so.

The Court: Then I will give you an opportunity to have somebody fly over here and show that it is not so.

As to the portion of this certification that your shipping company did not submit any application during the period in question, that one is easy for you. If this is inaccurate in that respect, you don't need hearsay, you have your own people to show that inaccuracy.

As to the other part of it, your company should be in a position to refute (206) this information if it is refutable.

This document is received." (pp. 272a-273a)

At the trial the Court correctly concluded that Compania Naviera Epsilon was the one who readily had the information to establish that it had exercised due diligence to properly man its ship and therefore had the burden of proof in this respect. Compare the colloquy with the Court's opinion wherein it states:

"The court finds that given the approval of the Greek official in Rotterdam, and the substantial efforts by

> Andronikis to find licensed seamen, cargo claimants have failed to satisfy their burden of proving that qualified seamen were available to serve as second mates at the appropriate rates in 1968."

Counsel for Compania Naviera Epsilon never availed himself of the opportunity afforded by the Court. The uncontradicted evidence proves that licensed Greek second mates were readily available at least four and a half months prior to the stranding, and that Compania Naviera Epsilon, S.A. did not even attempt to replace the unlicensed boatswain, Alexopoulos, with a duly licensed mate. Accordingly, at the time of the stranding the vessel was not properly manned in accordance with Greek law.

The testimony of Admiral Hanides re the availability of licensed mates is not contrary to the evidence given by the Director of the Maritime Employment Office to the effect that licensed seamen were available in 1969. Hanides merely testified that it was difficult to find licensed Greek mates in the Fall of 1968 (183a-184a).

In the case of *Ionian Steamship Company of Athens* v. *United Distillers of America, Inc.* (*supra*), the Court said, at page 84:

> "The exercise of *due diligence* envisages some activity. This record is barren of *anything* which the owner or his servants did prior to the commencement of the voyage and each of its stages * * *" (emphasis added)

We submit that in this case the record is barren of anything that Compania Naviera Epsilon did following the initial hiring of Alexopoulos in March of 1968 to find a licensed mate in order to comply with the Greek manning requirements.

The failure of Compania Naviera Epsilon to properly man its ship places the onus upon it of establishing that

its error in this respect not only was not but could not have been a contributing cause of the stranding.

In the case of *The Pennsylvania,* 86 U.S. 125 (1873), the Supreme Court said, at page 136:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that the fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

In the case of *United States* v. *Wessel, Duval & Co.,* 123 F. Supp. 318 (S.D.N.Y. 1954), cited at pages 17 and 18 of the brief submitted on behalf of Compania Naviera Epsilon, the Court said at page 336:

> "Although the Pennsylvania case involved a collision and its most frequent application has been to such cases, it is also applicable to stranding cases. The Aakre, supra; The Denali, 9 Cir., 112 F.2d 952 (the very point specifically passed upon by the court on rehearing); Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 10 S. Ct. 934, 34 L. Ed. 398."

Therein the Court specifically found that at the time the vessel stranded her master, a competent officer, was on the bridge together with the ship's duly licensed second mate; therefore, the absence of a third mate was not a cause of the stranding.

In the case of *Wilbur-Ellis Company* v. *The Captayannis S.*, 306 F. Supp. 866 (D.C. Ore. 1969) aff'd 451 F.2d 973

[CA 9th 1971], cert. den. 92 S. Ct. 962 (1972), cited at page 12 of ship owner's brief, the District Court specifically held at page 871 that if it could have found a statutory violation in the manning of the vessel it would have applied the Pennsylvania Rule and held the ship owner at fault.

The decision of this Court in the case of *Director General of India Supply Mission* v. *The Maru*, 459 F.2d 1370, is not to the contrary. Therein the Court held that the loadline act was not designed to prevent strandings, and furthermore that the overloading of the *Maru* did not cause or contribute to the stranding. Therefore, the Court refused to apply the rule of the Pennsylvania.

We submit that in the case herein proper manning requirments are designed to prevent a vessel from going aground and the rule of the Pennsylvania is applicable.

The District Court further said the absence of a qualified licensed second mate was not a proximate cause of the stranding because even a qualified second mate would not have questioned the master's navigation. In this connection we call this Court's attention to the comment made on page 23 of the brief submitted on behalf of Compania Naviera Epsilon wherein it is stated that the master had all necessary navigational calculations checked independently by a mate.

Comments on the Applicable Law and Standards of Care

Compania Naviera Epsilon, S.A. states at page 11 and 12 of its brief:

> "The applicable standards of manning are those determined in accordance with Greek law. That those standards may differ from the standards observed aboard United States vessels, or vessels of any other flag—they may be stricter with respect to some areas

> of nautical competence, and less strict with respect to others—is not something about which Cargo may complain. Having chosen to ship on a foreign vessel, Cargo must accept the standards established by the law of the vessel's flag."

We accept the statement as a tacit admission that the standards of care used by Compania Naviera Epsilon to make its vessel seaworthy were less than that required under United States law. We take issue with the statement as a valid proposition of law. The cargo was owned by United States consignees and was shipped under a contract of carriage governed by the United States Carriage of Goods by Sea Act. The cargo was being carried to United States ports.

In its treatise, *The Law of Admiralty,* Professors Gilmore and Black state at page 129:

> "* * * The concept of unseaworthiness alone, without the expansion in Cogsa Section 3(1) (b, c), above, would, in Anglo-American maritime law, include proper manning, equipping, and supplying, and fitness to receive and care for the cargo, but the additional clauses make clear the comprehensiveness of the duty, and may have been necessary in rules, such as those of which Cogsa is a near copy, *designed to be applied in countries where a different concept of seaworthiness may prevail."* (emphasis added)

In *Asbestos Corp. Ltd.* v. *Compagnie de Navigation, etc.,* 345 F. Supp. 814 (S.D.N.Y. 1972), where cargo sought to recover from owners of the French Flag vessel "Marquette" under COGSA and the U.S. Fire Act for loss due to fire on board the ship, Judge Levet, in holding the vessel owner liable, stated:

> "As hereinbefore stated the defense that the Marquette complied with SOLAS [Safety of Life at Sea

> Convention] *or the regulations of the French government* does not render the ship seaworthy." (Footnote, p. 820) (emphasis added)

In affirming the lower Court in 480 F.2d 669 (2nd Cir. 1973), Judge Timbers stated:

> "[2] Appellants contend that the vessel's fire fighting system was presumptively adequate because she had been issued a safety certificate pursuant to the Safety of Life at Sea Convention (SOLAS). Such certificates are issued if a vessel meets certain safety standards prescribed by SOLAS, including fire equipment standards. SOLAS, Ch. I, Reg. 11 (1948). Although the Marquette had been issued such a certificate prior to the fire here involved, we agree with Judge Levet that compliance with SOLAS did not establish the vessel's seaworthiness under COGSA. Since appellants expressly agreed in the bills of lading to be bound by COGSA, the standard of seaworthiness prescribed in that Act is controlling. *The COGSA standard requires the court to make an independent determination, based among other things upon expert testimony and accepted safety practices, as to whether the vessel had adequate equipment.* See, e.g. Edmond Weil, Inc. v. American West African Line, Inc. *supra.*" (p. 671) (emphasis added)

The best evidence of the proper standard of care permitted by the laws of this country with respect to manning requirements is set forth in 46 USC 223, which provides in part:

> "No such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.
>
> Every such vessel of one thousand gross tons and over, propelled by machinery, shall have in her service and on board three licensed mates, who shall stand

in three watches while such vessel is being navigated, * * *."

The Senate Committee on Commerce, Report No. 1322 of February 26, 1913, indicated the concern Congress had in 1913 about "safety of navigation" and guarding against a vessel "being by overpersuasion, influence or carelessness permitted to go to sea so poorly officered as to be unsafe herself"; further, that "motives of economy ought not to be permitted to authorize a few vessels to be navigated without efficient and sufficient officering." The report states in part as follows:

> "The committee recognized that it was impossible for Congress to know just what number of officers might be required in every case, and therefore we only prescribed such *minimum number as seemed to us absolutely necessary in all cases for that safety of navigation which ought to be required at all times.* We deemed it necessary to guard against a vessel being by overpersuasion or influence or carelessness permitted to go to sea so poorly officered as to be unsafe herself and a menace to other vessels. The scale we have provided is moderate and is fully equaled by the present custom and practice voluntarily adopted by the great majority of vessels. *We believe that motives of economy ought not to be permitted to authorize a few vessels to be navigated without efficient and sufficient officering.*" (emphasis added)

The parsimony of Compania Naviera Epsilon, S.A. in its failure to properly man its vessel is evidenced by the fact that Alexopoulos, the boatswain, although acting in the capacity of a second mate, did not receive a second mate's wages. Captain Koutsoukos the ship's master testified as follows:

> "Q. Did Mr. Alexopoulos receive the same basic wage that Mr. Marinatis [a licensed second mate] obtained?

A. No, I think it was £5 per month less.

Q. What was the basic wage that Mr. Marinatis received per month?

A. I think it was £79.5.0d.*

Q. Is that the going rate according to the Greek standards for a Second Mate?

A. Yes." (p. 139a)

Compania Naviera Epsilon, S.A. Failed to Exercise Due Diligence to Make Its Vessel Seaworthy in That it Failed to Provide the Navigators of the Nicolaos S. Embiricos With Up-to Date Navigational Publications and Its Failure in This Respect Contributed to the Stranding

The District Court found that Compania Naviera Epsilon, S.A. had failed to provide its deck officers with the latest issue of the West Coast of India Pilot, and further found that only in the up-to-date West Coast of India Pilot was there information which would have apprised the navigators of that ship that the Maldivian Islands were discernible on a ship's radar at a distance of 20 miles. The District Court further found that the master of the Nicolaos S. Embiricos failed to use his radar because he believed that the Maldivian Atolls were too low lying to be seen on the ship's radarscope.

In the case of *The Director General of India Supply Mission* v. *The Maru*, 459 F.2d 1370, this Court said that the failure of a vessel owner to furnish his ship with up-to-date navigational publications rendered the vessel unseaworthy. Consequently, the only issue is whether the District Court was correct in holding that the failure of Compania Naviera Epsilon, S.A. to render its vessel seaworthy in this regard was not a contributing cause of the stranding.

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* At the rate of exchange prevailing in March 1968 the mate's basic wage amounts to approximately $2,300.00 a year.

Compania Naviera Epsilon, in its brief at page 5, states:

> "There are absolutely no aids to navigation in the area of the One and a Half Degree Channel—no lighthouses, no RDF stations, no buoys."

We agree, with one exception—there was one, *and only one,* navigational aid which was readily available, i.e., the ship's radar. The District Court specifically found that if the radar had been utilized the stranding would have been avoided, but the radar was never activated. Captain Koutsoukos, the master of the "Nicolaos S. Embiricos," testified as follows:

> "The radar was for the Ship's safety and that is why they [the ship's owner] fitted radar to use it always." (p. 137a)

and further said:

> "The Owners were telling me to always have the radar in good order and to use it." (p. 137a)

The contention that Captain Koutsoukos would not have turned on the radar because he guessed that the course which he set would take the vessel 16 miles to the north of Suvadiva Atoll is fallacious. He had not obtained a navigational fix, i.e., an accurate position of his vessel, by star-sights since he left Colombo on the 13th. The only sights which he took were of the sun.* The noon May 14 position was not a navigational fix but a position obtained by dead reckoning, i.e., an estimate (pp. 166a-168a). Consequently, Captain Koutsoukos could not have been certain

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* The District Court erred when it said "At noon on the same day [May 13] Koutsoukos determined the vessel's actual position by means of celestial aids" (86a). At noon on May 13 Koutsoukos obtained a sunsight. This merely indicated the ship's position north or south of the Equator, i.e. it gave the ship's latitude but not its longitude. The noon position on May 13 was not a navigational fix, not an "actual position" but an estimate.

that the course which he set at noon May 14 would take the ship 16 miles to the north of Suvadiva Atoll.

It is the danger of stranding rather than the stranding itself which must be avoided. In this connection see *Ocean S.S. Co. of Savannah* v. *United States,* 38 F.2d 782 [CA 2d 1930], at page 782, wherein this Court said:

> ". . . it must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid."

Under such circumstances how can it be said that a capable, competent master, who had the information available to him that the Maldivian Islands afforded radar targets, would not have used the only navigational tool available to him?

In the case of *The Vizcaya,* 63 F. Supp. 898 (E.D. Pa. 1945), aff'd 182 F.2d 942 [CA 3rd 1950], cert. denied 340 U.S. 877 (1950), the Court stated:

> ". . . if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved *against* the shipowner. The Southwark, 1903, 191 U.S. 1, 14, 24 S. Ct. 1, 48 L.Ed. 65; Bank Line v. Porter, 4 Cir., 1928, 25 F.2d 843, 845; The Bill, D.C. 47 F. Supp. 969." (p. 904) (emphasis added)

and in *Waterman Steamship Corporation* v. *Gay Cottons,* 414 F.2d 724 [CA 9th 1969], where a vessel which stranded was held to be unseaworthy in failing to have an up-to-date deviation card for its radio direction finder, the Court, in referring to this unseaworthy condition, stated:

> "But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability if it merely *combined* with the crew's negligence in using it to be one of the causes of the stranding.

* * *

> *How can it be said, except as a matter of pure speculation, that if the finder had worked properly the grounding would still have occurred?*'' (p. 737) (emphasis added)

In this case the District Court erred when it failed to hold Compania Naviera Epsilon, S.A. at fault for its failure to supply the ''Nicolaos S. Embiricos'' with up-to-date navigational publications. The District Court was palpably wrong when it said:

> ''Nor is it more than remote speculation that the *Pilot's* [West Coast of India Pilot, New Edition] information would have induced Koutsoukos to turn the radar on.'' (p. 92a)

The *only* aid to navigation in the area of One and One Half Degree Channel was the vessel's radar. The *only* place the vessel's navigators could have obtained information that the Maldivian Islands were discernible on radar at a distance of 20 miles was in the *up-to-date West Coast of India Pilot which was not on board the vessel.* Koutsoukas knew and testified that the ''radar was for the ship's safety'' (p. 137a). The ''remote speculation'' is rather in the Court's suggesting that the information in the up-to-date Pilot would be ignored by a competent navigator who believes that radar is a useful device for the ship's safety. What is more important to the navigator than up-to-date Pilots, charts, light lists, and other navigational publications? (*The Maria* (*Gladioli* v. *Standard Export Lumber Co. Inc.*), 91 F.2d 819 [CA 4th 1937]). They are the tools of his trade, the sources from which he obtains critical and oft times crucial information. To even suggest that a competent navigator would not consult the Pilot and utilize its information displays a complete lack of appreciation of navigating at sea.

The up-to-date Pilot had the information which, if acted upon, would have saved the ship. But this Pilot was not

supplied by its owners. Its absence was, therefore, a cause of the stranding and Compania Naviera Epsilon, S.A., is liable.

Comments on the Laister Report, Exhibit I

When one feels compelled to attack his opponent on a baseless issue it is an indication of weakness.

The brief submitted on behalf of Compania Naviera Epsilon, S.A., states, at page 6:

> "Despite repeated requests, and an offer by Owners' counsel to go anywhere in the world to attend Captain Laister's deposition, he was not produced by Cargo."

The offer to attend the deposition of Captain Laister "anywhere in the world" was made by counsel for Compania Naviera Epsilon, S.A., at the conclusion of the testimony given by the unlicensed second mate Alexopoulos—a time when counsel for Compania Naviera Epsilon, S.A. was sorely in need of some evidence to buttress his case.

Thereafter counsel for Compania Naviera Epsilon, S.A. requested and obtained, without the necessity of a court order, the Laister report together with a stipulation voluntarily entered into by counsel for cargo claimants which permitted Compania Naviera Epsilon, S.A. to introduce the report into evidence. Counsel for cargo claimants thereafter never received any request to depose Captain Laister. His report was introduced into evidence by Compania Naviera Epsilon, S.A.

Cargo claimants did not attempt to withhold evidence—to the contrary they fully disclosed the evidence.

Conclusion

Compania Naviera Epsilon, S.A. failed to exercise due diligence to properly man its vessel; specifically, Compania Naviera Epsilon breached the statutory manning requirements promulgated by the Government of Greece in that its ship was not manned by three licensed mates. Compania Naviera Epsilon did not sustain its burden of proving that its failure to properly man its ship not only was not but could not have been a cause of the stranding, particularly in view of the fact that the unlicensed acting mate had the watch when the vessel stranded.

Compania Naviera Epsilon, S.A. also failed to exercise due diligence to properly equip its vessel with the latest navigational publications, and its error in this regard also contributed to the stranding and resulting loss.

The judgment of the District Court should be reversed.

Respectfully submitted,

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